Supreme Court, U. S.
FILED
DEC 28 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

No. 79-1014

ROBERT G. BUCKNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NORMAN H. McNEIL
30412 Moonmist Drive
Rancho Palos Verdes, CA 90274
(213)541-3537 (714)759-0801

Attorney for Petitioner

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IN THE
SUPREME COURT
OF THE UNITED STATES
October Term 1979
No.

ROBERT G. BUCKNER,

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES:

ROBERT G. BUCKNER, the petitioner herein, prays that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on October 3, 1979.

OPINIONS BELOW

The memorandum opinion of the United States Court of Appeals is not reported. It is printed and attached hereto as Appendix A. The opinion affirms jury verdicts of guilty of one count of conspiracy to defraud the United States, 18 U.S.C., §371; two counts of attempting to evade income tax, 26 U.S. C. §7201, and two counts of filing false tax returns, 26 U.S.C. §7206(1), for the taxable years 1970 and 1971. Judgment of guilty was entered by the District Court for the Southern District of California on January 30, 1978.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on October 3, 1979. A timely petition for Rehearing and Hearing en Banc was filed. The Order denying the Petition for Rehearing, filed December 4, 1979, is printed as Appendix B. Petitioner filed a motion to stay the mandate on December 10, 1979. As of December 26, 1979, the motion was pending before the Court of Appeals. The jurisdiction of the Supreme Court is based on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Was the defendant denied due process and the right to be apprised of the charges against him by the affirmance of convictions for income tax evasion where the substantive tax counts alleged no

amounts of unreported income or deficiency tax?

2. Was the defendant denied due process and the right to a fair trial by affirmance of convictions for tax evasion, filing false returns and conspiracy to defraud where the prosecution presented the jury, in support of the no number tax evasion charges, calculations of unreported income and deficiency taxes not properly based upon the Internal Revenue Code?

3. Did the trial judge's admission of extrajudicial statements of co-defendants, which statements tended to implicate or inculpate defendant, constitute a violation of the Sixth Amendment's Confrontation Clause, as interpreted by Bruton v. United States, 391 U.S. 123 (1968)?

4. Was the trial judge's admission of extrajudicial statements of co-defendants error because no warning was given at the time the statements were given to the Internal Revenue Agent?

STATUTES INVOLVED

26 U.S.C. §7201: Any person who willfully attempts to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other panalties provided by law, be guilty of a felony and, upon conviction thereof, shall be

fined not more than $10,000, or imprisoned not more than five years, or both, together with the costs of prosecution.

26 U.S.C. §61(a): Except as otherwise provided in this subtitle, gross income means all income from whatever source derived,....

26 U.S.C. §1372. Election by small business corporation: (a) Eligibility. - Except as provided in subsection (f), any small business corporation may elect, in accordance with the provisions of this section, not to be subject to the taxes imposed by this chapter. Such election shall be valid only if all persons who are shareholders in such corporation--...consent to such election.

26 U.S.C. §1373. Corporation undistributed taxable income taxed to shareholders:...(b) Each person who is a shareholder of an electing small business corporation...shall include in his gross income...the amount he would have received as a dividend,...pro rata...an amount equal to the corporation's undistributed taxable income for the corporation's taxable year.... (c) Undistributed taxable income ...means taxable income minus... the amount of money distributed

as dividends during the taxable year, to the extent any such amount is a distribution out of earnings and profits of the taxable year as specified in Section 316(a)(2).

26 U.S.C. 1376. Adjustment to basis of stock of, and indebtedness owing, shareholders: (a)...The basis...shall be increased by the amount required to be included in the gross income...under Section 1373(b)...(b)(1).... The basis of a shareholder's stock...shall be reduced (but not below zero) by an amount equal to his portion of the corporation's net operating loss.... (2) The basis of any indebtedness...shall be reduced (but not below zero) by an amount equal to his portion of the corporation's net operating loss...to the extent that such amount exceeds the adjusted basis of the stock. ...

STATEMENT OF THE CASE

I

Omission of amounts of unreported income and additional tax due in the indictment is fatally defective.

The original and redacted indictment charged defendant with attempted tax evasion with respect to his 1970 and 1971 income tax returns upon the following allegations:

> "On or about April 15, 1971, in the Southern District of California, defendant Robert G. Buckner, did knowingly and willfully evade and defeat, and attempt to evade and defeat a substantial amount of tax due and owing by him to the United States during and for the calendar year 1970 by using fraudulent techniques, devices and falsified corporate records to conceal and hide personal income, and by signing and mailing and causing to be mailed on or about April 15, 1971, a false, fraudulent and perjurous United States Individual Income Tax Return, Form 1040, for the year 1970 which stated that there was a tax due and owing of $72,913 whereas, as defendant then and there well knew and believed, he was obligated to the United States for additional taxes due on thousands of dollars of concealed and unreported income."

The same format is utilized by the prosecution in charging tax evasion on the 1971 tax return. Similarly, the allegations of the indictment charging defendant filed false returns for 1970 and 1971 omit reference to any amounts

of omitted taxable income. The usual allegations charging tax evasion follow:

> "That on or about the __ day of ___, 19__, in the _____ District of _____, (Defendant) did willfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 19__, by filing or causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of _____, at _____, a false and fraudulent income tax return wherein he stated that his taxable income for said calendar year was the sum of $_____ and the amount of tax due and owing thereon was the sum of $_____, whereas, as he then and there well knew, his taxable income for said calendar year was the sum of $_____, upon which said taxable income he owed to the United States of America an income tax of $_____." 1/

At the trial, defendant moved to dismiss the substantive tax counts on the ground the indictment failed to contain all essential elements of the offense charged. Russell v. United States, 369 U.S. 749(1962).

1/ Tax Division, Department of Justice, Manual for Criminal Tax Trials (1973 Ed.) pp. 91-96.

The tax crime statutes involved in this case plainly call for an amount of unreported income from which an additional tax is computed as essential elements of the charges. With respect to the tax evasion counts, the essential elements are willfulness and the tax in addition to what has been paid. Sansone v. United States, 380 U.S. 343,351 (1965). The understatement of tax is essential because "it has been authoritatively held that to establish its case the government must prove not only an attempt willfully to defraud it but also that a tax in addition to what the taxpayer had already paid remains due and owing." United States v. Schenck, 126 F.2d 702,704 (2d Cir. 1942), cert. denied, sub nom. Moskowitz v. United States, 316 U.S. 705 (1942).

The trial court denied defendant's motions to dismiss and for a bill of particulars upon a showing by the prosecution that the government's files, containing computations of unreported income and additional tax, were made available to defense counsel. However, the government's computations disclosed to defendant's counsel were not utilized or relied upon during the trial. The Ninth Circuit concludes there is no pleading requirement that the amount of additional tax be numerically stated. Appendix A, p. 6. The Court of Appeals made no reference in its opinion to the omission of unreported income from which an amount of additional tax could be computed. There is precedent in the Seventh Circuit that a tax evasion indictment alleging only an understatement

of gross income is fatally defective. Anderson v. United States, 11 F.2d 938 (C.C.A. 7 1926).

The essential elements of the charge of attempted tax evasion have been deemed to include (1) willfulness, (2) the tax in addition to what has been paid, and (3) an affirmative act constituting evasion. Sansone v. United States, supra. Consistent with the definition of the crime, the Department of Justice has followed the policy of alleging unreported income and the additional tax due thereon over the years. Defendant here does not object to the proposition that the government may prove a lesser amount than the amount charged to sustain a conviction. United States v. Cole, 463 F.2d 163, 167(C.A. 2, 1972), cert. denied, 409 U.S. 942 (1972). In this case, contrary to department policy and the law, the prosecutor drafted a novel indictment, omitting both the understatement of income and the tax in addition to what had been paid. The omissions fail to charge the crime of attempted tax evasion.

The Ninth Circuit, in affirming the trial court's denial of defendant's motion to dismiss, re-defines the crime of attempted tax evasion. No authority is relied upon or cited for the new definition. The ruling decides, for the first time, an important federal question in conflict with a decision of this Court, Sansone v. United States, supra., and other federal courts which have fixed the nature of the statutory crime and its elements.

II

Prosecutional misconduct has deprived defendant to his right to a fair trial.

The alleged source of unreported income and additional tax at issue in this case is assumed to flow from defendant's relationship with an electing corporation, 26 U.S.C. §§1372 et seq., sometimes called a "Subchapter S" corporation. Again, the prosecution of defendant is novel because there are no other reported cases involving computations of fraudulently unreported diversions of constructive dividends from an electing corporation, if indeed the corporation made a proper election. The record shows no proper consent was filed and Internal Revenue Agents were aware of the defect. After the no number indictment was filed, the prosecutor made available the government's files, including computations of alleged omitted constructive dividends and additional tax calculated in a traditional manner, as if no electing corporation was involved. In fact, presuming no current earnings, the computations made the adjustments in the form of capital rather than ordinary gain.

During pre-trial conferences with the prosecutor and the Internal Revenue Agent selected as the "expert witness", the question regarding the defective election and potential income from recapture of negative basis in 1971 remained unanswered. Defendant moved for a bill of particulars seeking answers to the prosecution's view of the defective election and the theory

of taxation, all in view of the failure to disclose numbers in the indictment and the different methods of taxation which apply between a regular and electing corporation.The prosecutor stated the government would not rely on the defective election and his files, including computations of unreported income and additional tax, had been p_ovided the defense. The government relied upon United States v. Miller, 545 F.2d 1204 (C.A. 9, 1976) cert. denied 430 U.S. 930(1977). The trial court denied defendant's motion for a bill of particulars. The prosecutor never used or relied upon the computations furnished defendant. Instead, through the "expert witness", the jury was advised the defendant had intentionally and fraudulently escaped income tax on "benefits" and "recapture of losses" (negative basis) in amounts substantially in excess of the original computations and regardless of whether the corporation was electing or not. The Ninth Circuit affirms on the grounds no issue on the defective election was presented; complete factual disclosure was made by the prosecution prior to trial; and there would be a deficiency tax either way. (Appendix A, pp. 8, 11-13).

The pre-trial computations disclosed to defendant prior to trial showed alleged tax deficiencies for 1970 and 1971 in the respective amounts of $9,826.27 and $6,718.43 derived from diversions from a regular corporation like the case of United States v. Miller, supra. Some "specific items" were abandoned by the government during the trial but, mixing his "benefits" and "recapture" theories, the expert

presented the jury with alleged taxes due for 1970 and 1971 in the respective amounts of $17,467 and $124,866. Thus, this is not a case where the government proved less additional tax due than the indictment alleged. Here, the government is permitted to omit numbers from the traditional indictment and, during the trial, fill-in the gaps in the indictment with numbers substantially more than disclosed. The Ninth Circuit, presuming there would be substantial deficiencies either way, affirms the questions as involving only intent, not proper construction of the statutes. Appendix A, p. 13. The Court of Appeals relies on United States v. Miller, supra. There is no question defendant was prejudiced.

Defendant does not urge "technicalities in taxation" as a ground for new trial but, instead, his claim is that he was deprived of a fair trial because he did not and could not have defrauded the government of the sums presented to the jury. The use of the no number indictment is the vehicle. If its use is sanctioned, variances with pleading and proof and discovery in tax crime cases become meaningless. Contrary to the rule of the Miller case, there is a place in the tax law where computations of income and tax must be based on the statute.

As certiorari was denied in United States v. Miller, 545 F.2d 1204 (C.A. 9 1976), cert. denied, 430 U.S. 930 (1977), and the opinion stands as the exclusive authority relied upon by the government and Ninth Circuit in support of affirmance of defendant's conviction, review of the

opinion is essential to defendant's appeal and prospective tax evasion prosecutions. Miller involved diversions from a regular corporation which the taxpayer caused to be falsely reflected on the corporate records as loans rather than sales. There was a showing the corporation had no current earnings so that unreported constructive dividends could be construed to be a return of capital, in part, and then capital gain under traditional application of rules in civil tax litigation cases. Meeting taxpayer's objection that there was no substantial deficiency following the civil rule, the government contended the civil rule should not apply in a criminal proceeding. Davis v. United States, 226 F. 2d 331 (C.A. 6. 1955) cert. denied, 350 U.S. 965 (1956). In Miller, the Ninth Circuit adopted the Davis rule, noting application of civil constructive dividend rules in a criminal proceeding would exalt substance over form if automatically applied. In affirming the conviction, the Ninth Circuit accepted the diversion as salary, not constructive dividends; it found taxpayer's false recording of the transactions left open the classification of "salary"; and, in any event, there was no recording of loan repayments on the records. In the instant case, the prosecution started with dividends but presented the jury and trial court with "benefits", "recapture of losses" and "negative basis". No statutory mode beyond 26 U.S.C. §61(a) was admitted but the Department of Justice argued on brief the "benefits" were taxable because there was no intent to repay. Later, after oral argument, the Department expanded its argument to include 26 U.S.C. §§1373 et seq.

On petition for rehearing, the government finally agreed there was a bona fide issue concerning the no number indictment.

The record here shows defendant used corporate funds to remodel his home, part of which were charged to his loan account in 1970 and 1971 and the balance charged to subsidiary loan records which had been lost during the investigation. Plainly, this is not a case like Miller and the defective small business election added a dimension which should have eliminated Miller as precedent along with the technical requirements of the statutes pertaining to computation of income from a Subchapter S corporation. However, the Ninth Circuit improperly holds that the tax may be computed, as it was, either way in support of the conviction. The result is that "benefits" are taxed to defendant as if he diverted the amounts from a regular corporation and, for 1971, he has been taxed with recapture of losses for 1969 and 1970, plus negative basis, as if there was a proper electing corporation. To this point, it has made no difference that distributions from an electing corporation are taxed, by statute, in a special way and there is no provision for recapture of negative basis in the Internal Revenue Code.

There are two substantial federal questions submitted for review on the premise that defendant was deprived of a fair trial by affirmance of the trial court's failure to grant defendant's motions. The failure of this Court to consider the implication of permitting different tax computations to be made between civil and criminal prosecutions has prompted an

inconsistent result in the present case, based on the premise that substance vs. form, not the taxing statutes, control in tax prosecutions. In any event, the defective Subchapter S election cannot be ignored as a mere technicality. The electing corporation is a creature of the statute. The failure to make a proper election required whatever deficiency computation the prosecution submitted be made with respect to defendant as a stockholder of a regular corporation. Brutche v. Commissioner, 585 F.2d 436 (C.A. 10, 1978). Thus there was no basis in the law for recapture of losses and negative basis in 1971.

III

Admission of extrajudicial statements of codefendants was prejudicial error.

This was a joint jury trial of defendant Buckner, his business associate, Dennis Lang and his accountant, Richard Teerlink. All were charged with conspiracy to defraud the government; specifically, alleged filing of Buckner's false returns. Lang also was charged with making a false statement and Teerlink was charged with knowingly preparing the false return for 1970. Both Lang and Teerlink were interviewed by Internal Revenue agents. No warnings were given. The dialog was transcribed but neither Lang nor Teerlink signed the transcriptions. The content of the statements deals generally with Lang's knowledge of transactions relating to purchases for Buckner, the accounting and payment therefor and Lang's making arrangements for a bank loan for Buckner

at the end of 1971. Teerlink was the accountant and return preparer for 1970 and a part of 1971. At times he made entries in the records. Some of the entries (or lack thereof) precipitated the charges. The statements of codefendants, typical in a tax case, are replete with references to defendant Buckner - tending to show knowledge of the transactions at issue.

Tax crimes, unlike most criminal activities, are proved by the prosecution's reliance on circumstantial evidence to demonstrate guilty intent. The circumstances may cover many transactions over several years; the internal and third party records which track specific transactions; and involve numerous witnesses, some of whom may be targets of an obvious conspiracy charge. In the instant case, Lang and Teerlink were nominated as coconspirators in a grand scheme to defeat and evade Buckner's taxes. At the conclusion of the trial, the prosecution determined to offer the codefendants' statements in evidence ostensibly as admissions against their penal interest. The transcripts themselves were not offered. What the prosecution wanted to do was re-ask some of the questions asked by the Internal Revenue Agents and have the agents relate what the codefendants stated. All counsel objected on the grounds, among others, that there was no proper warning to the codefendants, United States v. Heffner, 420 F.d 809 (C.A. 4, 1969); United States v. Leahey, 434 F.2d 7 (C.A. 1, 1970); and United States v. Sourapas, 515 F.2d 295 (C.A. 9, 1975) and, on Buckner's part, the admission would violate the Confrontation Clause of the Sixth Amendment as

interpreted by Bruton v. United States, 391 U.S. 123 (1968). The trial court overruled the first objection on authority of Beckwith v. United States, 425 U.S. 341 (1976) and overruled Buckner's objection on the Bruton rule on the assumption all references to defendant would be excluded. But references to Buckner were not excluded.

As with the other issues submitted for review, the Ninth Circuit's affirmance of the trial court's rulings are novel in the context of a tax prosecution. The failure to give the Internal Revenue Service warning was not considered by this Court in Beckwith, supra, and there are no reported cases involving the Bruton rule in a tax prosecution. The Ninth Circuit affirmed admission of the oral statements on the grounds that the evidence, as submitted, did not tend powerfully to inculpate defendant; that the prejudicial effect was minimized by other evidence; and the jury was properly admonished to disregard. With respect to the lack of a warning, the Court of Appeals held the self-imposed warning rule was not violated by the Internal Revenue Agents because codefendants were not targets of the investigation at the time the statements were made.

This Court in Bruton v. United States, 391 U.S. 123 (1968), held that the admission of a defendant's post-conspiracy confession implicating a codefendant constitutes reversible error if the confessing defendant does not take the stand because the accused is deprived of his Sixth Amendment right of confrontation. Under Bruton, if the statements implicate the accused, limiting instructions to the jury are to no avail. There is no question the evidence here implicates defendant Buckner.

The issue for review is whether the admission of the statements inculpating defendant is constitutional error of the first magnatude so that no amount of showing of want of prejudice could cure the error, Davis v. Alaska, 415 U.S. 308, 315 (1974), or was it harmless error? Chapman v. California, 386 U.S. 18 (1966). A tax prosecution, unlike the crime involved in Bruton, turns on many specific items and circumstances bearing upon intent. Evidence of purchases for Buckner, charged to the corporation, partly recorded as loans, partly not, is cumulative when reflected in the books and through co-defendants' admissions. But admissions implicating defendant by his business associate and return preparer must, of necessity, be accorded greater credibility. In this sense, the erroneous admission of the confession in Bruton is no different than admission of the statements of co-defendants in this case. The error is not harmless.

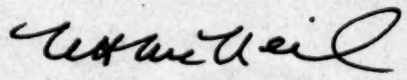
The trial court in this case ruled codefendants' statements admissible regardless of lack of an IRS warning on authority of Beckwith v. United States, 425 U.S. 341 (1976). The trial judge did not rule on the merits of the failure to give the co-defendants the self-imposed warning. In effect, the Ninth Circuit sustains the trial court but on a different ground. The so-called Leahey-Heffner doctrine, espoused by the Ninth Circuit in United States v. Sourapas, 515 F.2d 295 (C.A. 9, 1975), requires suppression or reversal where the Internal Revenue Service fails to follow its own directives. The opinion in Beckwith, supra, does not address itself

to the issue. Here, the Ninth Circuit affirmed because it found codefendants were only witnesses at the time they made the statements. The declarations were not admitted on that basis and, consistent with the Leahey, Heffner and Sourapas rule, this Court should exercise its supervisory powers to find the declarations of co-defendants inadmissible.

Conclusion

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



Norman H. McNeil
Attorney for Petitioner

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	NO. 78-1319
v.	)	MEMORANDUM
ROBERT G. BUCKNER, Defendant-Appellant.	)	

Appeal from the United States District Court for the Southern District of California

Before: CHAMBERS AND HUG, Circuit Judges. and INGRAM,* District Judge

Robert G. Buckner (hereafter appellant) appeals from his conviction by jury verdict of one count of conspiracy to defraud the United States in violation of 18 U.S.C. § 371; two counts of attempting to evade income tax in violation of 26 U.S.C. § 7201; and two counts of knowingly subscribing to materially false tax returns in violation of 26 U.S.C. § 7206(1).

*Honorable William A. Ingram, United States District Judge for the Northern District of California, sitting by designation.

The taxable years involved are 1970 and 1971. Also convicted of conspiracy and filing of false loan application was one Lang, an alleged co-conspirator. Lang has not appealed.

We briefly review the facts in their aspect most favorable to the government. Glasser v. United States, 315 U.S. 60 (1942).

In 1969, appellant and Lang formed a Subchapter S corporation for the stated purpose of constructing and managing Hotels and motels. Two projects were undertaken and were eventually completed. Construction loans for these were obtained from Transamerica Company, under which the corporation drew monthly amounts based on the amount of expenditure incurred during the previous month. Early in 1970, and while the hotel projects were under construction, appellant made improvements to his residence, most of the costs of which were billed to the corporation and entered on the corporate books as items attributed to hotel construction. Billings for work performed at the residence specified in some cases work performed for the hotel projects. In December 1971, appellant was advised to deposit a substantial sum in his corporate loan account in order to achieve a positive balance in accordance with Subchapter S requirements. Through Lang a bank loan was negotiated to make this deposit, but the money was loaned to the corporation rather than to appellant, and the necessary deposit to the loan account was not made until January 1972, after the close of the taxable year 1971.

Consequently, appellant's capital had a negative balance as of the close of the taxable year 1971.

Under the government's theory of the case, all of the sums expended on the house and charged to the corporation were taxable to appellant as ordinary income. In addition, because at the close of the year 1971 appellant's corporate capital account in the Subchapter S corporation was overdrawn, it is the government's contention that appellant should have reported as income all of the corporate net operating losses passed through to him and claimed by him for the year 1971, and withdrawals in 1971 which excluded net operating losses for 1969 and 1970 should have been reportable as a capital gain. An additional small amount of deficiency was attributed to the non-reporting of interest received by appellant incident to the repayment of a loan. Appellant contended at trial that the residence expenditures should have been treated as loans, and that the amounts of certain loans for the benefit of the corporation for which appellant was obligated should have been credited to his corporate capital account, thus causing the account to be in a credit balance position.

Appellant seeks our review of five issues:

(1) Should counts 2 and 5 of the indictment, each alleging violation of 26 U.S.C. § 7201 have been dismissed for vagueness, or in the alternative should the government have been required to furnish a bill of particulars?

(2) Should portions of certain statements of co-defendants, taken after the end of the alleged conspiracy, have been excluded from evidence because no cautionary admonition was given the declarants prior to the taking of the statements, or because the reception of the statements in evidence constituted error under the rule of Bruton v. United States, 391 U.S. 123 (1968)?

(3) Was the instruction given by the trial court with respect to reliance on the advice of accountants error?

(4) Was the evidence in support of the substantive counts of the indictment sufficient to sustain the verdict?

(5) Was the evidence in support of the conspiracy count sufficient to sustain the verdict?

We determine each of the claims of error adversely to appellant's contention. Two of the issues presented may be disposed of summarily. The issue encompassed in inquiry number 3 above, the propriety of the instruction relating to reliance on advice of accountants, was not properly preserved for our review. No objection was tendered at the appropriate time to the propriety of the giving of the instruction of which appellant now complains (TR, 2991, 3203), and a claim of error may not be appropriately considered now. Fed. R. Crim. P. 30; United States v. Crum, 529 F.2d 1380 (9th Cir. 1976). In any event, the instruction actually given was requested by appellant and not withdrawn. (TR, 2991).

The fifth issue, concerning the sufficency of the evidence to support the verdict upon count 1 (conspiracy) is presented by appellant largely upon the theory that since the evidence presented in support of the substantive counts is insubstantial, so also therefore is that in support of the conspiracy. Since, as we shall explain, we believe that the evidence in support of the substantive counts is sufficiently substantial we need discuss that contention no further. Appellant, however, also urges that in order to sustain the conspiracy count the government must establish that some amount of tax was due. The government correctly points out that the point has been previously determined adversely to appellant's contention in United States v. Fruehauf Corp., 577 F.2d 1038, 1071, 1072 (6th Cir. 1978). Appellant has further contended that an alleged overt act must be itself a criminal act. An overt act need not itself be a criminal act, as its only function is to demonstrate that the conspiracy is operative. Yates v. United States, 354 U.S. 298 (1957). United States v. Miller, 491 F.2d 638 (5th Cir. 1974), cert. denied, 419 U.S. 970 (1974). There was ample evidence before the jury to link co-defendant Lang to the conspiracy.

We turn now to a discussion of the remaining issues before us.

(1) Sufficiency of Counts 2 and 5 of the Indictment and/or Necessity for Bill of Particulars.

The alleged insufficiency in the challenged counts 2 and 5 consists of their failure to allege amounts of omitted income or additional tax due. Appellant contends that the counts as drawn fail to charge a

criminal offense and are not in compliance with Fed. R. Crim. P. 7(c) requiring that an indictment "be a plain, concise and definite written statement of the essential facts constituting the offense charged."

The necessary elements of the offense defined in 26 U.S.C. § 7201 and (1) willfulness, (2) existence of a tax deficiency, and (3) an affirmative act constituting an evasion or an attempted evasion. Sansone v. United States, 380 U.S. 343 (1965). Sufficiency must be measured by determining whether the charging allegations contain the elements of the crime alleged and whether they sufficiently inform the defendant as to what he must be prepared to meet and whether the allegations present with sufficient clarity an issue sufficient to be raised in bar to a subsequent prosecution. United States v. Miller, 545 F.2d 1204 (9th Cir. 1976); United States v. Grayson, 416 F.2d 1073 (5th Cir. 1969).

Correctly stating that the charging allegations must contain each of the elements necessary to constitute the crime, appellant contends that a statement of the additional tax due is one of those elements, and that its absence from the instant counts renders them fatally inadequate.[1/] None of the cases cited by appellant, impose a pleading requirement that the amount of additional tax due be numerically stated. We find no requirement of any specific numerical allegation with respect to tax deficiency, providing the foregoing necessary criteria are met. Count 2 of the indictment (of which count 5 is a substantial replica) alleges:

"On or about April 15, 1971, in the Southern District of California, defendant ROBERT G. BUCKNER, did knowingly and willfully evade and defeat, and attempt to evade and defeat a substantial amount of tax due and owing by him to the United States during and for the calendar year 1970 by using fraudulent techniques, devices and falsified corporate records to conceal and hide personal income, and by signing and mailing and causing to be mailed on or about April 15, 1971, a false, fraudulent and perjurous United States Individual Income Tax Return, Form 1040, for the year 1970 which stated that there was a tax due and owing of $72,913 whereas, as the defendant then and there well knew, and believed, he was obligated to the United States for additional taxes due on thousands of dollars of concealed and unreported income."

The plain purport of the allegations of counts 2 and 5 is that defendant knowingly and willfully sought to evade income taxes by the use of fraudulent devices including falsification of corporate records, resulting in many thousands of dollars of taxable but unreported income escaping tax scrutiny thus evading a substantial amount of tax. This in our opinion is quite sufficient notice of the charges confronting the defendant and is drawn with sufficient specificity to foreclose further prosecution upon the same facts.

The request for bill of particulars was not improperly denied. Although apparently now disputed, the trial court found that the government provided full discovery to the defense. We accept that finding. Appellant contends principally that the government should have been required to disclose its theory of Subchapter S taxation for 1971. (Opening Brief, 28). Assuming, as we do, that all relevant facts were disclosed and available, the government is not obliged to disclose the theory under which it will proceed. Rose v. United States, 149 F.2d 755 (9th Cir. 1945).

The trial court having been satisfied that complete factual disclosure had been made, it was not an abuse of discretion to refuse a bill of particulars, cf. Wong Tai v. United States, 273 U.S. 77 (1927).

(2) Statements of Co-defendant - Bruton Rule.

Appellant complains of the admission in evidence of the overheard statements of co-defendants Lang and Teerlink, urging that insofar as the statements referred to appellant they deprived him of his right to confrontation and were inadmissible on that ground under the rule of Bruton v. United States, 391 U.S. 123 (1968). Appellant also contends that the failure to give the declarants the cautionary admonition voluntarily adopted by the Internal Revenue Service (IR-897, IR-949) renders the statements inadmissible because they were made by alleged co-conspirators at a time after the termination of the conspiracy.

The admission of the statements did

not violate the appellant's right of confrontation. The court properly admonished the jury that the statement of each declarant was admitted only as to that particular declarant and against no one else. The nature of the content of the statements was not so powerfully incriminating as to render the court's admonition ineffective. Bruton, supra.

The declarations in question, insofar as they effect appellant, deal with matters conceded, such as personal purchases being carried on corporation's books, accounting methods utilized by the corporation, and matters surrounding appellant's need for a $300,000 loan. (TR. 2160-2183). They do not therefore tend powerfully to inculpate appellant, and if they do in any degree their prejudicial effect is rendered minimal by the quantity of other evidence on the same subject matters. Cf. United States v. Mackey, 571 F.2d 376 (7th Cir. 1978).

It is noted that the trial court took great pains to excise from the statements all material which might, in his opinion, transgress the Bruton rule (see TR, 2125, et seq.), finally permitting the government to offer those portions of the statements desired by it to be received as oral statements against the interest of the declarant. The court noted that counsel for appellant had no objection to the portions of the statement which the government desired, and the court permitted, to be offered. (TR, 2123, 2124).

With respect to the other grounds urged, the statements were neither offered

nor received as statements of co-conspirators and were not received against any defendant other than the particular declarant; the jury was so instructed. The self-imposed warning rule was not violated since at the time the statements were taken the declarants were not the subject of a criminal investigation, and the terms of the rule were not therefore transgressed.[2/] 5 Administration, CCH Int. Rev. Manual, ¶ 242.132, p. 28,776; United States v. Sourapas, 515 F.2d 295 (9th Cir. 1975).

Because we have found no transgression of the self imposed warning rule of the Internal Revenue Service, and because there is no Miranda problem inherent in this situation, see, Beckwith v. United States, 425 U.S. 341 (1976), we need not address the question of the standing of appellant to raise these questions.

(3) Sufficiency of the Evidence to Support the Verdict on the Substantive Counts.

Appellant contends that the trial court erred in determining that the corporation was an electing corporation under Subchapter S, thus providing a vehicle to the government to advance inconsistent theories of taxation. He claims that by reason of the claimed error the government was able to avoid the necessity of treating the specific items of expenditure by the corporation in appellant's behalf as accountable in appellant's loan account, because in any event they would be taxable by the recapture of business losses and of the debit balance in his loan account by reason of Subchapter S taxation. It is

further claimed that appellant was not given the benefit of set offs and credits which if allowed would have given him a credit balance and no deficiencies for 1971 and that there is inadequate proof of deficiencies for 1970. He also contends that there is insufficient proof of willfulness.

The claim that the court made an erroneous determination of Subchapter S validity is based upon an instruction given by the court (TR, 3182) in which the characteristics of a subsection S corporation for purposes of taxation were described and which stated that the corporation in question was an electing corporation. This is the only content of the record to which appellant refers to support his contention that the court made any determination of the question one way or another. In fact, the giving of the instruction was not error, but was necessary because of the theory upon which the case was tried by both sides. Moreover, the instruction was never objected to by anyone, and the issue of the validity of the election was never, in any guise, presented to the court for determination.

As part of his pretrial motion to dismiss, appellant urged that the government's theory of taxation, based in part upon the identity of the corporation as an electing corporation, was speculative and without support in law, and that the appellant was not adequately apprised of the nature of the crimes alleged against him. (CT, 42-46). By denying the motion to dismiss (CT, 109-110), the court ruled

on the sufficiency of the indictment and not upon the validity of the subchapter S election, the latter issue not having been squarely presented.

The trial court simply made no ruling, erroneous or otherwise, on the validity of the election because the issue was never presented to it, and cannot be presented to us now.

The case was tried on the assumption of a valid election by all parties. The two expert witnesses, Mr. Breese for the government and Mr. Calkins for the appellant, each testified upon the assumption that the corporation was an existing Subchapter S entity.

Mr. Breese, whose full testimony is transcribed at pages 2469-2702 of the Reporter's Transcript, articulated the theory of the government's case. Mr. Calkins, whose testimony is transcribed at pages 2833-2947, was called as an expert by appellant. Each of these witnesses considered essentially the same evidence[3/] and drew different inferences therefrom, and, in consequence, expressed differing opinions. Mr. Calkins acknowledged, that given Mr. Breese's inferences, appellant's capital account was overdrawn, and in a negative position as of the close of 1971, and that because of that a significant taxable result ensued. (TR. 2930). In effect, he acknowledged that if one drew the inferences from the facts that Mr. Breese did, the latter's testimony was correct. Thus, the matter of deficiency became a matter of jural determination, and there was substantial evidence in the record

to support the result reached by the jury.

Leaving aside the question of Subchapter S taxation, substantial deficiency was attributable to specific items as set forth in Exhibits 275, 276 and 277 which had no relationship to the corporation's status or lack thereof as an electing corporation. (TR. 2686). While expert opinion differed with respect to the presence or absence of specific item deficiency, we think there was sufficient evidence which, if believed, would adequately support the verdict.

Appellant finally raises the issue of the sufficiency of the evidence to support the element of willfulness. He suggests that the government's theory is novel and sophisticated, and not within the ken of the ordinary layman, and suggests that because of the complexities the latter would not have requisite knowledge, much less willful intent. We think that the government's theory with respect to which the special items were billed, together with the totality of the evidence with respect to the purported assumption of the $275,000 obligation and the facts surrounding the making and deposit of the $300,000 loan, if believed, would constitute an adequate quantum of evidence to support the verdict on the issue of willfulness. The question is not one of a nice appreciation of the tax laws, but rather of intent. United States v. Miller, 545 F.2d 1204 (9th Cir. 1976).

We affirm the judgment.

F O O T N O T E S

1/ Sansone v. United States, 380 U.S. 343 (1965; United States v. Schenck, 126 F.2d 702 (2nd Cir. 1942); Radford v. United States, 290 F.2d 9 (9th Cir. 1961); Heasley v. United States, 218 F.2d 86 (8th Cir. 1955).

2/ The testimony of agent Wordell at TR, 2073 recounts that his interview with Teerlink was a witness interview. Counsel for Lang did not assert the necessity of a warning. (TR, 2102).

3/ Mr. Calkins conceded that one or two items considered by him in the formation of his expert opinion were not in the record. (TR, 2890, 2939).

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	NO. 78-1319
	)	
v.	)	ORDER
	)	
ROBERT G. BUCKNER,	)	
	)	
Defendant-Appellant.	)	

Before: CHAMBERS and HUG, Circuit Judges, and INGRAM,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Hug has voted to reject the suggestion for a rehearing en banc, and Judges Chambers and Ingram have recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Dated: November 30, 1979

*The Honorable William A. Ingram, United States District Judge for the Northern District of California, sitting by designation.